Cases referred to:—

(1) *Mackenzie Kennedy v. Air Council* (1927) 2 K.B. 517, 533.

(2) *Jarrott v. Ackerley* 113 L.T. 371.

COURT OF APPEAL.

L. A. J. Smith for the appellants.

F. R. N. H. Massey for the respondents.

Murray-Aynsley C.J. : — These proceedings arise out of a rather technical point. The first respondents are an unincorporated body but a registered society. By section 28(b) of Cap. 217 certain provisions are made with respect to the juridical capacity of registered societies including (b) the capacity to sue or be sued in the name in which it was registered. This is not sufficient to incorporate such a body — *Mackenzie Kennedy v. Air Council*[1]. Provision was made for moveable property but not for immoveable property. In the present case the predecessors in title of the appellants purported to grant a monthly tenancy to this society. I think that was inoperative. If authority is needed see *Jarrott v. Ackerley*[2].

It was contended however that the Court should cause the intended transaction to take effect in some other way. The learned Judge considered that the transaction should be construed as an agreement to grant a tenancy to trustees on behalf of the society. This was based on the statutory provision in England in the Law of Property Act 1925 which dealt with the situation created by the prohibition in that Act of the vesting legal interests in land in the case of infants. It has clearly no application here. Here the only thing that the parties intended was that the society should be tenant. The matter would be of no practical importance except for the Control of Rent Ordinance. I do not think that the Court should be influenced by the existence of that Ordinance in deciding whether a tenancy exists or not. The Ordinance restricts the legal rights of the owners in property. I do not think that the law should be strained to give protection to those not within its terms. The society uses the property in question for the presumably admirable purpose of running a school. I think that that is irrelevant. There is nothing here to raise an equity in favour of the society. They have been using the premises in return for the payment of a modest rent. The appellants are entitled to terminate that arrangement. I would allow the appeal with costs and enter judgment for the appellants as claimed also with costs. Deposit to appellants.

Mathew C.J. : — I have had the advantage of reading the judgment of the learned President in this appeal with which I am in entire agreement and have nothing to add.

Knight J. : — At one time I thought there was some force in the suggestion that there was an agreement between the parties to transfer a tenancy — but even if there is anything in this argument I do not know how specific performance could be ordered because the tenants do not exist. This difficulty admittedly might be overcome by the appointment of trustees yet why should equity be involved to give relief to the respondents in a situation in which they have no rights under the common law. The Rent Control Ordinance is artificial, though no doubt necessary. I agree with the learned President that it raises no equity in favour of the Society.

I too would allow the appeal with costs and enter judgment for the appellants as claimed with costs. The deposit will be paid to the appellants.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Allen & Gledhill.*

TEH LEE TONG v. REX

[A. Cr. J. (Spenser Wilkinson J.) November 10, 1951]

[Penang — Criminal Appeal No. 22 of 1951]

Criminal procedure — Summary trial — Whether prosecution is bound to call as witnesses all persons from whom statements have been taken.

The fact that a witness is really a defence witness is a sufficient reason for not tendering him for cross-examination.

In this case the learned Judge considered the question whether it is incumbent on the prosecution in a summary trial to call as witnesses all persons from whom statements have been taken. He summarised the position as follows:

(1) All witnesses from whom statements have been taken should be brought to the Court by the prosecution, except those whose evidence will clearly and obviously throw no light on the case; any witness not so brought to Court must be made available to the accused, should he desire to call him.

(2) Having brought the witnesses to Court the prosecuting officer is not bound to call or to offer for cross-examination a witness whose evidence is in his opinion unnecessary or is obviously hostile

(3) The existence of witnesses brought to Court but not called or offered for cross-examination under (2) above must be brought to the attention of the Court so that they are available to be called by the defence, or by the Court should the Court consider this necessary.

[Editorial Note: The same question in its application to an Assize Court was considered by the Privy Council in **Adel Muhammed el Dabbah v. Attorney-General** (1944) A.C. 156; (1944) 2 All E.R. 139, where it was held that the prosecution in a criminal case has a discretion as to what witnesses they shall call. It is consistent with the discretion that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary,

to tender for cross-examination by the defence witnesses whose names are on the back of the information but who have not been called to give evidence for the prosecution, but it remains a matter for the discretion of the prosecutor. In **R. v. Bryant** (1946), 31 Cr. App. R. 146, it was held that where the prosecution have taken a statement from a person who can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence, but they are not under the further duty of supplying the defence with a copy of the statement which they have taken.]

Cases referred to:—

(1) *Public Prosecutor v. Lee Pak* (1937) M.L.J. 265; (1938) F.M.S.L.R. 1.

(2) *Rex v. Sanmugam* (1932) M.L.J. 75; (1933) S.S.L.R. 337.

(3) *Muthusamy v. Public Prosecutor* (1948) M.L.J. 57.

(4) *Jusoh bin Awang v. Public Prosecutor* (1950) M.L.J. 69; 1 M.L.R. 36.

MAGISTRATE'S APPEAL.

R. D. Hume for the appellant.

C. M. Sheridan (Federal Counsel) for the respondent.

Spenser Wilkinson J. : — In this case the appellant had been convicted in respect of possession of opium, chandu and various articles connected therewith found upon his premises at 82, Batu Lanchang, Penang.

The main ground of appeal argued before me was that the conviction was against the weight of evidence and I dismissed the appeal, because in my view there was ample evidence upon which the learned President could find, as he did, that the articles in question were in the appellant's possession.

One point arises, however, in this appeal upon which I think it might be useful if I expressed my views. In the course of the trial before the learned President the prosecution called as a witness a boy of 18, who was employed by the accused and whose evidence given in Court was wholly favourable to the defence. There is no suggestion in the record that this witness gave evidence any different from that contained in his statement. The prosecution also called the accused's next door neighbour who also gave evidence favourable to the defence. The statement of this witness to the Customs Officer was referred to but no actual inconsistency between his evidence in Court and the statement to the Customs Officer was proved and no serious attempt was made to discredit his evidence.

Whilst it is no doubt true that it is the duty of the prosecution to lay all the material evidence before the Court I do not think that this principle need be carried to the length of calling for the prosecution witnesses whose evidence is wholly adverse to the prosecution and wholly favourable to the defence — in short, defence witnesses — simply because statements have been taken in the course of the investigation. The following passage from the judgment of Whitley Ag. C.J. in the case of *Public Prosecutor v. Lee Pak*[1] is relevant in this connection :—

"It is not incumbent upon the prosecution to call as witnesses all persons from whom statements have been taken. If it is clear that their evidence will throw no light on the case, it would be a sheer waste of time and money to bring them to Court. If the accused should desire to call any such person as a witness he should of course be given the opportunity to do so, no matter what view the prosecution may have taken as to the value of the evidence which he is able to give. This question of to what extent the prosecution is bound to call witnesses was discussed in the case of **Rex v. Sanmugam**[2], where a number of authorities are referred to, but that case only deals with witnesses who have been called at a preliminary enquiry. In a summary trial before a Magistrate the prosecuting officer must of course have a far wider discretion."

The relevant passage from the judgment in *Rex v. Sanmugam*[2] is as follows :—

"In a trial by jury the prosecuting officer is not bound to call as a witness for the Crown or tender for cross-examination a witness who gave evidence in the preliminary enquiry, whose evidence in his opinion is unnecessary, hostile, or not believed."

I do not know exactly what the learned Judge had in mind in saying in the first of these cases that in a summary trial the prosecuting officer has a wider discretion than in an Assize case, but I presume that he was referring to the fact that after a preliminary enquiry the prosecution is to some extent bound by the discretion already exercised in the Lower Court. It seems to me, however, that to place on a prosecuting officer before the hearing of a summary trial the task of deciding which witnesses are not to be believed is to place too great a responsibility upon him. Therefore in applying the principles of the case of *Rex v. Sanmugam*[2] in summary trials I would prefer to omit the words "or not believed" which appear in that judgment.

I think the result of the above remarks combined with the two decisions referred to may be summarised in this way :—

(1) All the witnesses from whom statements have been taken should be brought to the Court by the prosecution, except those whose evidence will clearly and obviously throw no light on the case; any witness not so brought to Court must be made available to the accused, should he desire to call him.

(2) Having brought the witnesses to Court the prosecuting officer is not bound to call or to offer for cross-examination a witness whose evidence is in his opinion unnecessary or is obviously hostile.

(3) The existence of witnesses brought to Court but not called or offered for cross-examination under (2) above must be brought to the attention of the Court so that they are available to be called by the defence, or by the Court should the Court consider this necessary.

It must be borne in mind, however, that the fact that the prosecution has taken statements from witnesses and has subpoenaed them may place the accused in an awkward position if suddenly faced with the offer of a witness, whose statement he has never seen. This difficulty could probably be met in most cases by supplying to the accused a copy of the statements of the witnesses not called by the prosecution. Where this course appears undesirable or for any other reason has not been followed the Court would no doubt in a proper case grant an adjournment to enable the accused to take statements from such witnesses.

The above remarks assume that the witness will give evidence in accordance with his statement. Where a prosecution witness whose statement is favourable to the prosecution gives evidence favourable to the defence, he should be discredited in accordance with the procedure laid down in detail in the judgment of Taylor J. in *Muthusamy v. Public Prosecutor*[3] which was approved and followed in *Jusoh bin Awang v. Public Prosecutor*[5].

Appeal dismissed.

Solicitors for the appellant: *Hogan, Adams & Allan.*

In re A TAX-PAYER (No. 2)

[A. C. J. (Murray-Aynsley C.J.) July 19, 1955]

[Singapore — District Court Appeal No. 50 of 1954]

Income Tax Ordinance, 1947 — Assessment — "Share of partnership income" — Capital appreciation during continuance of partnership — Death of owner of beneficial interest — Whether this ipso facto determines partnership.

In this case the taxpayer and X entered into a partnership agreement on April 13, 1950, with the Y — Co. for the development into a building estate of a large piece of land owned by the latter as trustees for Z. Z died on April 16, 1951. After his death, the Company entered into an arrangement with the appellant and X to sell the land which had meanwhile appreciated considerably in value and the difference between the sale value and its original value was shared between the partners in accordance with the terms of the partnership agreement.

The taxpayer's share was assessed as partnership income and the Board of Review upheld the assessment.

On appeal the taxpayer contended that (1) his share should not have been assessed as partnership income; (2) Z's death had determined the partnership; and (3) there had been a dissolution of the partnership by agreement.

Held: (1) capital appreciation during the continuance of the partnership was taxable income; (2) Z's death did not *ipso facto* determine the partnership and the partnership continued to be in existence until the land was sold; (3) there had been no actual dissolution.

[**Editorial Note:** The Income Tax Ordinance, 1947 is now Chapter 166 of the Laws of the Colony of Singapore, Edition of 1955.]

INCOME TAX APPEAL.

C. H. Smith for the appellant.

A. V. Winslow (Crown Counsel) for the respondent.

Murray-Aynsley C.J. : — This appeal concerns an assessment of $35,842.33 on the sum of $119,474.45 "share of partnership income". The facts are as follows :—

The late Mr. R. M. Z — owned among other things the beneficial interest in a large piece of land in the neighbourhood of K. H. Road. The Y — Trustee Ltd. (who may be described as the Company) were the trustees. For the purpose of exploiting the land in question an agreement was entered into on the 13th April 1950 between the Company on the one part and two persons of whom the appellant was one, on the other. The scheme was that the Company should contribute the land valued at $414,000, and the parties on the other part should contribute the cost of development and also the specialized knowledge and the time and trouble necessary for the development of a building estate. Profits and losses were to be divided equally between the parties of the 1st and 2nd parts. The word "partnership" is not used in the agreement but it is not disputed that this agreement constituted a partnership and made the parties partners.

The matter did not proceed as had been expected. On 16th April 1951 Mr. Z — died suddenly before any development had taken place. The Company with other persons were executors of his will. As such they desired to realize such assets as were most easily to be disposed of for the purpose of paying estate duties. Among these was the land in question. By agreement among the parties this land was sold for rather more than $900,000. The difference between this sum and the original value of the land was divided between the parties in accordance with the terms of the agreement. The appellant's share is the sum assessed as partnership income. In view of the objects of the agreement it is clear that capital appreciation during the continuance of the partnership would be "income" for the purpose of taxation. It is not contended that the activities of the appellant were such as to render capital appreciation of land income otherwise than under the agreement. It seems to me, therefore, that the whole question depends on whether the partnership continued until the land was sold. I am satisfied that the death of Mr. Z — did not *ipso facto* determine the partnership. It was contended that there was a dissolution by agreement. There seem to have been discussions in which the phrase "forgetting about the agreement" was used. But I cannot see that there was an actual dissolution. If there had been the appellant would have received